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No.

In The

Supreme Court of the United States

October Term, 1996

ROBERT D. DAUGHERTY,

Petitioner,

vs.

SARASOTA COUNTY, a political subdivision of the State of Florida,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. May federal appellate courts eliminate landowners rights under a new standard of review where the landowner proves intentional discrimination by a governmental body in denying a permit for a permitted use of land?

II. May a federal appellate court enter judgment on the merits against a plaintiff on just compensation claims which were dismissed before trial on the basis of ripeness?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Petitioner, Robert D. Daugherty, respectfully petitions for writ of certiorari to review the judgment in the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals of the Eleventh Circuit is reproduced in the Appendix filed herewith at 3a. The order denying Petitioner's motion for rehearing in the appellate court is reproduced at 2a. The District Court opinion, per Magistrate Charles Wilson, denying Sarasota County's motion to dismiss for lack of subject matter jurisdiction and alternative motion for summary judgment, was reported at 157 F.R.D. 542 (N.D. Fla. 1994), and is reproduced at 17a. The unreported opinion of District Court, per Magistrate Thomas B. McCoun, III, denying the Respondent's motion for judgment as a matter of law or for new trial is reproduced at 29a.

STATEMENT OF JURISDICTION

The Court of Appeals denied Daugherty's Petition for Rehearing and Suggestion of Rehearing En Banc on July 25, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth, Seventh and Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE

Petitioner, Robert D. Daugherty, purchased land in Sarasota County, Florida. Daugherty expected to use the property as a commercial borrow pit, but he was denied. The

property was (and is) zoned as "OUE" ("open use estate") by Sarasota County, a zoning designation that made commercial borrow pits a permitted use of the property. Between 1983 and 1989, Robert Daugherty applied on four separate occasions to obtain an earth moving permit for this permitted use from the Sarasota County Commission. On each occasion, Daugherty was denied a permit, even though his neighbor, Wendell Davids, had been granted a permit. Daugherty was denied a permit for earthmoving of any kind, or under any conditions. Daugherty asked a state circuit court, by certiorari petition, to review the Respondent's 1989 denial and quash the denial, the petition was denied. (App. C, 18a). Some time after the final denial of Daugherty's 1989 earth moving permit application, Sarasota County passed Ordinance 89-76 which placed a cap on borrow pit operations and rendered any further application by Daugherty futile. The ordinance showed direct consideration of Daugherty's circumstances and rendered further efforts to seek a permit futile. (App. D, 35a).

Following the denial of his 1989 permit application and the subsequent passage of Ordinance 89-76, Daugherty filed suit in thr United States District Court in the Middle District of Florida. On March 18, 1994 Sarasota County filed a motion to dismiss for lack of subject matter jurisdiction or for summary judgment (its second). (App. C, 19a). The District Court per Magistrate Charles Wilson denied the motion and found the Petitioner's just compensation claims were ripe and the doctrine of *res judicata* did not bar Daugherty's federal constitutional claims. (App. C, 23a, 24a).

The court also specifically found that the Petitioner's evidence was sufficiently probative regarding the diminution in the property's value and the interference with his investment-backed expectation as a result of the Respondent's actions. (App. C, 26a, 27a).

On the eve of trial, Respondent moved for reconsideration. The court overruled the previous determination that the just compensation claims were ripe.[1] (App. D, 34a). The court also reconsidered and dismissed Counts II, IV and VII of Daugherty's complaint which alleged unconstitutional vagueness of the permitting ordinance and that denial of the permit applications and rezoning constituted arbitrary and capricious due process violations. Daugherty was given a jury trial *only* on his equal protection claim. (App. D 31a, 34a). Daugherty proved to the jury that he was treated differently from other applicants and that Ordinance 89-76 was an act of intentional discrimination by Sarasota County. (App. D, 33a). After the jury verdict in favor of Daugherty the Respondent filed a renewed motion for judgment as a matter of law.

Both parties appealed to the Eleventh Circuit. Sarasota County appealed the jury's verdict and Daugherty appealed the dismissal of his just compensation claims and other matters. (App. B, 7a, 8a).

In an unpublished opinion, the Eleventh Circuit overturned the jury's verdict, finding that the 1989 permit denial was "rationally related" to a legitimate government interest. The court also reversed the trial court's dismissals on the basis of ripeness, but summarily ordered that judgment be entered against Daugherty[2] because, in the appellate court's opinion, the property was capable of being developed some time in the future. The appellate court concluded without a trial that future

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1. The Court of Appeals erroneously claimed that the claims were dismissed on a motion for judgment as a matter of law. This is contrary to Judge McCoun's order. (App. D).

2. The appellate opinion also declined to determine jurisdiction as to Count V, yet ordered entry of judgment against Daugherty anyway. (App. B, 12a).

development would be an economically viable use of the land. (App. B, 11a-12a).

REASONS FOR GRANTING THE WRIT

The writ in this case should be granted because the Court's reversal of the jury verdict heralds the end of equal protection and due process to landowners. The summary dismissal of all claims, without any trial or opportunity to present evidence violates the Seventh Amendment to the United States Constitution. The Eleventh Circuit Court of Appeals departed from the accepted and usual course of judicial proceedings, and departed from the established standards of review for an equal protection claim based on a permit denial. The appellate opinion eliminates equal protection claim for non-minority landowners.

The private ownership property and the ability make economically viable use of that property is one of the bedrock principles of this Nation. This principle is embodied in the Constitution's prohibitions against denying land owners equal protection of the laws and guaranteeing them just compensation. The right is fundamental. If there is going to be a new standard for permit denials of permitted uses in the equal protection context, that standard should be set by this Court, and not by the Eleventh Circuit Court of Appeals. This Court needs to establish the rights of property owners to equal treatment for permitted use.

The appellate court's determination that Petitioner had no claim for a temporary taking, because his land could be developed some time in the future, (made after Daugherty's just compensation claims had been dismissed on the basis of ripeness, not on the merits) directly impinges on Daugherty's right to have the cause tried by a jury, as guaranteed by the

Seventh Amendment, and is a direct affront to this Court's unmistakable holding in *First English Evangelical Lutheran Church of Glendale v. City of Los Angeles, California*, 482 U.S. 304 (1987), regarding compensation for the temporary taking of property.

Land owners, their attorneys, municipal bodies, and their counsel are entitled to clear unified standards regarding their respective rights under the United States Constitution. This Court needs to make it clear that very property owner *regardless of race or creed* is entitled to be free from intentional discrimination for the issuance of land use permits where all written permit requirements are met. Also, due process requires findings of facts and conclusions of law once jurisdiction and ripeness are found to be present.

I.

FEDERAL APPELLATE COURTS MAY NOT ELIMINATE LANDOWNERS RIGHTS UNDER A NEW STANDARD OF REVIEW WHERE THE LANDOWNER PROVES INTENTIONAL DISCRIMINATION BY A GOVERNMENTAL BODY IN DENYING A PERMIT FOR A PERMITTED USE OF LAND.

Petitioner cannot emphasize enough that he was only seeking a permit to use his property for a use permitted under existing zoning. Daugherty was not seeking rezoning. Daugherty was not seeking a variance. Daugherty had reasonable expectation of using the property as a borrow pit, especially since his neighbor to the north, Wendell Davids, had obtained an earth moving permit for a commercial borrow pit. (App. B, 4a). Daugherty proved intentional discrimination and his case should have been governed by the heightened scrutiny

standard reflected in *E & T Realty v. Strickland*, 830 F.2d 1107 (11th Cir. 1987).

The decision of the Eleventh Circuit overturning Daugherty's jury verdict heralds the elimination of equal protection of the law for land owners seeking permits. The opinion makes it very clear that only certain classes (African Americans, women, etc.) not individuals, will receive the safeguards of the equal protection clause of the Fourteenth Amendment. Daugherty proved to the jury that Sarasota County had intentionally discriminated against him both in permit denials[3] and passing an ordinance aimed directly at him. (App. D, 33a, 34a). Such discriminatory zoning practices are correctly characterized by this Court as ". . . the antithesis of land use control . . . " *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 132 (1978). The Eleventh Circuit opinion ignores *Penn Central*'s teaching. The opinion states, at footnote 6 that ". . . an allegation of personal animus against an individual cannot give rise to an equal protection claim because the equal protection clause only protects against class based discrimination". (App. B, 14a). In other words, if Petitioner was not white, or in some "protected class" then, and only then, could he be entitled to a permit.

Penn Central teaches that the Court must examine the treatment of other parcels by the government authority. The Opinion dismissed the fact that Daugherty's neighbor to the north, Wendell Davids had been granted a permit by

3. The appeals court suggested, contrary to the express findings of two trial judges (App. C, 24a; App. D, 31a-32a), that Daugherty had "raised" his equal protection claim in an appeal of his permit denial to a state circuit court in a certiorari petition. The panel did not hold Daugherty had been given a "full and fair" opportunity to litigate his federal equal protection claim, possibly because the court was aware, at oral argument, that Sarasota County had destroyed its records of Daugherty's permit application during the dispute. (App. B, 5a). *See also* App. C, 22a-24a and App. D, 31a-32a.

characterizing the permit as a "bad decision".[4] The appellate opinion does not articulate how granting one person a permit and denying his neighbor a permit is a distinction between similarly situated persons that is reasonable, not arbitrary and substantially related to the object of the legislation. *Mackenzie v. City of Rockledge*, 920 F.2d 1554 (11th Cir. 1991).

The appellate opinion plainly constituted a re-examination of facts that were found by the jury, in violation of the Seventh Amendment. As the District Court Judge noted, the jury was properly instructed in accordance with the respondent's request, and the jury found that Daugherty had been intentionally discriminated against, and treated differently from other persons similarly situated, even though he met the requirements for issuance of an earth moving permit. (App. D, 34a, 35a). If such conduct does not violate the promise of equal protection, then no landowner (unless non-white or a women) can expect or receive equal protection.

II.

FEDERAL APPELLATE COURT MAY NOT ENTER JUDGMENT ON THE MERITS AGAINST A PLAINTIFF ON JUST COMPENSATION CLAIMS WHICH WERE DISMISSED BEFORE TRIAL ON THE BASIS OF RIPENESS.

This is a fundamental denial of due process. In addition to re-examining the facts found by the jury, the Eleventh Circuit also ruled on the merits of those claims dismissed prior to trial. The sole basis for this judgment is the appellate court's joke was a remark, made long after the just compensation claims were

4. The Petitioner suggests this is a subjection distinction irrelevant to an equal protection claim, and demonstrates the appellate court was not applying law to his case.

dismissed on the basis of ripeness (App. D, 31a, 34a), that the Petitioner's property was developable "some time in the future". (App. B, 11a-12a). Instead of allowing Daugherty to trial on the merits before of a jury, the appellate court seized on this remark to deny any remaining constitutional claims. To begin with, the possibility of future development cannot stand as a bar to a just compensation claim for a temporary taking. This Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California,* 482 U.S. 304 (1987) settled this point long ago. This Court, in *First English*, plainly recognized that a temporary taking was no different from a permanent taking and that compensation must be paid. *Id.* at 319.

No trial was had on those just compensation claims that were dismissed on the basis of ripeness. Daugherty did present an important question to the Eleventh Circuit Court of Appeal concerning the issue of ripeness as the Florida Supreme Court did not recognize even the existence of an inverse condemnation remedy until *Joint Ventures, Inc. v. Department of Transportation,* 563 So.2d 622 (Fla. 1990). Indeed, that decision was notoriously circumspect and described the remedy as merely being implied, which led to varying results on ripeness determinations, *e.g., Blumberg v. Pinellas County,* 836 F. Supp. 839 (M.D. Fla. 1993). Daugherty appealed the adverse ripeness determination of Judge McCoun because although his federal lawsuit was filed after *Joint Ventures* was decided, his claim accrued in 1989, prior to the *Joint Ventures* decision. (App. B, 7a-8a). The Eleventh Circuit created a new standard of review to defeat Daugherty's equal protection claim on his permit denial and then denied Daugherty a trial on any just compensation claim.

CONCLUSION

This Court needs to establish the rights of property owners to be free from intentional dicrimination where the landowner has met all written requirements to use his land. Also, the reversal of a claim dismissed on jurisdiction or ripeness cannot be summarily ruled upon by the appellate court. The landowner is entitled to a full hearing on the merits.

The Supreme Court has not definitively addressed the equal protection clause in the context of intentional discrimination with respect to persons who have the right to a permit or other property right but who are not a member of a suspect class. The writ should be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JULY 25, 1996

IN THE COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-3595

D.C. Docket No. 91-1092-CIV-T-24A

ROBERT D. DAUGHERTY,

Plaintiff-Appellee,
Cross-Appellant,

versus

SARASOTA COUNTY, a political subdivision of the State of Florida,

Defendant-Appellant,
Cross-Appellee.

No. 95-2275

ROBERT D. DAUGHERTY,

Plaintiff-Appellant,

versus

SARASOTA COUNTY, a political subdivision of the State of Florida,

Defendant-Appellee.

Appendix A

On Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(OPINION _____, 11TH CIR., 19__, __ F.2D __)

Before: EDMONDSON and DUBINS, Circuit Judges, and LOGAN*, Senior Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rule of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Joel F. Dubins
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

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* Honorable James K. Logan, Senior U.S. Circuit Judge for the Tenth Circuit, sitting by designation.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED MAY 13, 1996

* * *

Appeals from the United States District Court
for the Middle District of Florida

(May 13, 1996)

Defendant Sarasota County appeals the trial court's denial of its motions for judgment as a matter of law on the equal protection claims of Plaintiff Robert D. Daugherty ("Daugherty"). Daugherty cross-appeals, alleging that the trial court[1] erred in barring several of his claims and in granting Sarasota County's motion for a stay of a permanent injunction pending appeal.

I. Statement of the Case

A. *Factual History.*

In 1983, Daugherty purchased some land in Sarasota County with the purpose of developing the property as a commercial borrow pit. The property was zoned OUE, which meant that commercial borrow pits were a permitted use of the property. Nevertheless, a county ordinance, Ordinance 81-60, required county commission approval for any dig involving more than 10,000 cubic yards.[2] Daugherty submitted four

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1. By consent of the parties, this case was assigned to Magistrate Judge Charles R. Wilson pursuant to 28 U.S.C. § 636(c)(1). The case was later transferred to Magistrate Judge Thomas B. McCoun, III.

2. Under Ordinance 81-60, the Board of County Commissioners was (Cont'd)

applications for earthmoving permits, all of which involved digs of more than 10,000 cubic yards. Sarasota County denied each of these applications.

Daugherty's proposed borrow pit would have entailed the use of 100 to 200 dump trucks a day passing over a private access easement known as "Melody Lane." At about the time of Daugherty's first application, Daugherty's neighbor to the north, Wendell Davids ("Davids"), obtained an earthmoving permit for a commercial borrow pit that involved the use of Melody Lane. However, Davids was unable to maintain a dust-free environment on Melody Lane, and his earthmoving permit was therefore not renewed the following year. Davids's experience generated neighborhood opposition to Daugherty's subsequent applications to use Melody Lane in connection with his proposed borrow pit.

In 1989, APAC-Florida applied for an earthmoving permit. The application was denied because of the potential noise, dust, and vibration impact on the adjacent property. As a result of its experience with the APAC-Florida application, the county commission decided to enact comprehensive amendments to the zoning code. One of the changes was Ordinance 89-76, which put a 50,000 cubic yard cap on new borrow pits in any of three zoning districts which make up 69% of the county. Borrow pits approved prior to the enactment of the amendments were grandfathered in.

(Cont'd)
bound not to approve the issuance of an excavation or fill permit unless it first determined, among other things, that: "The excavations or filling operation will not adversely affect groundwater levels or cause adverse environmental impacts."

Appendix B

Subsequently, the county commission passed an ordinance which greatly strengthened the environmental regulations of commercial developments. Among other things, the new regulations required the paving of roads where more than 10,000 cubic yards were to be hauled adjacent to a residentially developed area. The new environmental safeguards rendered the cap in Ordinance 89-76 unnecessary. As a result, a borrow pit operator petitioned the county commission for removal of the cap in Ordinance 89-76. The county commission removed the cap uniformly throughout the county.

B. *Procedural History.*

Following the county commission's denial of his EM-454 application in 1989, Daugherty appealed by certiorari to the Florida circuit court. The circuit court reviewed the record of the proceedings before the county commission to determine whether the county had accorded Daugherty due process, had complied with the essential requirements of the law, and had made a decision supported by substantial competent evidence. Daugherty raised federal constitutional issues before the circuit court, including his equal protection claim. The circuit court denied Daugherty's claims, and Daugherty did not appeal the circuit court's decision.

In 1991, Daugherty filed a multi-count civil rights action against Sarasota County in federal district court. In the complaint, Daugherty pled the following theories of relief: just compensation (counts I and VI), arbitrary and capricious due process violation (counts II and VII), equal protection (count III), unconstitutional vagueness (count IV), and due process takings (count V).[3] Daugherty sought declaratory and monetary

3. Daugherty chose to file a "shotgun complaint" in the trial court. In (Cont'd)

relief in the complaint and later added a request for injunctive relief.

The trial court received various motions for summary judgment and for judgment as a matter of law. In response, the trial court dismissed counts I and VI, containing the just compensation claims, for lack of subject matter jurisdiction because the just compensation claims were not yet ripe. The trial court concluded that the arbitrary and capricious due process takings claim in count II was ripe, but that collateral estoppel barred the claim. Having concluded that the arbitrary and capricious due process takings claim in count VII was not ripe because Daugherty had failed to apply for a variance, the trial court dismissed count VII for lack of subject matter jurisdiction. With respect to count III, the trial court concluded that Daugherty's equal protection claim was ripe, that it was not barred by collateral estoppel, and that there was sufficient evidence in the record to support a jury verdict in Daugherty's favor on count III. The trial court rejected Daugherty's claims in count IV of unconstitutional vagueness both on grounds of collateral estoppel and on the merits. Finally, the trial court

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(Cont'd)

Executive 100, Inc. v. Martin County, 922 F.2d 1536, 1540 (11th Cir.) *cert. denied*, 502 U.S. 810 (1991), this court delinated the various constitutional claims available to a plaintiff seeking to challenge a local government's refusal to rezone his or her property. In doing so, we did not intend to imply that every plaintiff upset by a county government's failure to rezone his or her property should attempt to proceed in the district court under each of the theories laid out in *Executive 100*. Instead, the plaintiff's attorney should apply the law of *Executive 100* to the facts of the case and plead only those claims which are "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed. R. Civ. P. 11(b)(2).

dismissed the due process takings claim of count V for lack of subject matter jurisdiction because it was not yet ripe. Nevertheless, the trial count offered its opinion that this claim could not succeed on the merits anyway, because Daugherty's property was still capable of being developed for a profit.

The jury returned a verdict in favor of Daugherty on the basis of count III. The trial court's amended final judgment included a damages award and a permanent injunction requiring Sarasota County to issue Daugherty an earthmoving permit. Sarasota County filed a notice of appeal and a motion to stay execution of the judgement and the permanent injunction. The trial court stayed the permanent injunction pending Sarasota County's appeal to this court.

II. Issues Presented

1. Whether Daugherty's equal protection claim based on the 1989 permit denial is barred by res judicata.

2. Whether the trial court erred in failing to grant judgment as a matter of law on both of Daugherty's equal protection claims.

3. Whether Daugherty's Ordinance 89-76 equal protection claim is ripe for review.

4. Whether the trial court erred in failing to reverse the jury's grant of damages for mental anguish.

5. Whether the judgment should be set aside because the trial court erred in denying Sarasota County's allegedly non-race based peremptory challenge and in denying Sarasota County further voir dire.

6. Whether the trial court erred in barring Daugherty's just compensation, substantive due process, and procedural due process claims on the basis of res judicata.

7. Whether Daugherty's due process takings claim is ripe.

8. Whether the trial court erred in holding that Ordinance 81-60 is constitutional on its face and as applied to Daugherty.

9. Whether Daugherty's just compensation claim was ripe.

10. Whether the trial court erred in granting Sarasota County's motion to stay the permanent injunction requiring Sarasota County to issue Daugherty an earthmoving permit.

III. Standards of Review

The issue of whether a claim is barred by the doctrines of res judicata or collateral estoppel is a determination of law subject to *de novo* review. *Israel Discount Bank Ltd. v. Entin*, 951 F.2d 311, 314 (11th Cir. 1992).

Motions for directed verdict and judgment notwithstanding the verdict[4] are subject to *de novo* review.

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4. As a result of the 1991 amendments to Federal Rule of Civil Procedure 50, both directed verdicts and judgments notwithstanding the verdict are now called "judgments as a matter of law."

Sherrin v. Northwestern Nat'l Life Ins. Co., 2 F.3d 373, 376 (11th Cir. 1993). Accordingly, this court applies the same standard the trial court applied in determining whether to grant the motion. *Id.* This court considers all the evidence, and the inferences drawn therefrom, in the light most favorable to the nonmoving party. *Id.* If the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict, then the motion was properly granted. *Id.* Conversely, if there is substantial evidence opposed to the motion such that reasonable people, in the exercise of impartial judgment, might reach differing conclusions, then such a motion was due to be denied. *Id.*

The question of ripeness "goes to whether the district court had subject matter jurisdiction." *Greenbriar Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 (11th Cir. 1989). Accordingly, as a jurisdictional issue, a ripeness determination is reviewed by this court *de novo*. *Reahard v. Lee County*, 30 F.3d 1412, 1415 (11th Cir. 1994), *cert. denied*, __ U.S. __, 115 S.Ct. 1693 (1995) (*Reahard II*).

Whether the trial court erred in failing to reverse the jury's grant of damages for mental anguish is a question of state law subject to *de novo* review on appeal. *Fioretti v. Massachusetts Gen. Life Ins. Co.*, 53 F.3d 1228, 1234 (11th Cir. 1995), *cert. denied*, __ U. S. __, 116 S.Ct. 708 (1996) (citing *Salve Regina College v. Russell*, 499 U.S. 225, 231-33, 111 S.Ct. 1217, 113 L. Ed.2d 190 (1991)); *Overseas Private Inv. Corp. v. Metropolitan Dade County*, 47 F.3d 1111, 1113 (11th Cir. 1995).

The trial court's denial of Sarasota County's non-race based peremptory challenge and its failure to allow further voir dire are reviewed for an abuse of discretion.

Appendix B

A challenge to the constitutionality of a statute is a question of law subject to *de novo* review. *See, e.g., United States v. Garrett*, 3 F.3d 390 (11th Cir. 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 1100 (1994).

The accepted standard of review for a stay pending appeal is whether the trial court abused its sound discretion. *In re Grand Jury Proceedings of Beverly*, 468 F.2d 732, 741 (5th Cir. 1972).[5]

IV. Discussion

A. *Counts I and VI: Just Compensation*

On appeal, Daugherty assigns as error the trial court's ruling that his just compensation claims, counts I and VI, were not ripe for federal review because of the present availability of an inverse condemnation action in state court. We disagree with the trial court's analysis of the ripeness issue. The State of Florida did not recognize the existence of an inverse condemnation action until April of 1990. *See Reahard II*, 30 F.3d at 1417 (citing *Joint Ventures, Inc. v. Department of Transp.*, 563 So.2d 622 (Fla. 1990) (Barkett, J., writing for the majority)). The events of which Daugherty complains all occurred prior to that date. Thus, Daugherty's claims became ripe once Sarasota County made its final determinations on denying his applications for a borrow pit permit and rezoning his property. At this point, Daugherty had suffered a constitutionally compensable injury, and the State's later

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5. In *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

recognition of an inverse condemnation remedy could not retroactively deprive Daugherty's claim of its ripeness. At the very least, Daugherty has a ripe federal claim for the temporary taking of his property without just compensation from the time of Sarasota County's final determinations in this case until the Florida Supreme Court recognized an inverse condemnation action in *Joint Venutres.*

Although the just compensation claims were ripe for adjudication, it is clear from the record that Daugherty could not have succeeded on those claims. The jury's verdict on the equal protection claim proves that Daugherty suffered economic detriment as a result of Sarasota County's actions. However, in regulatory takings cases, the question is not whether the plaintiff has suffered *some* economic detriment, but rather whether the government entity has deprived the plaintiff of "*all or substantially all* economically viable use" of his or her property. *Rehard v. Lee County,* 968 F.2d 1131, 1136 (11th Cir. 1992), *cert. denied,* __U.S. __, 115 S.Ct. 1693 (1995) (*Reahard I*); *see also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 n.4, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985) ("Whether the denial of a permit would constitute a taking in any given case would depend upon the effect of the denial on the owner's ability to put the property to productive use.")

In response to a motion for judgment as a matter of law, after hearing all of Daugherty's evidence, the trial court specifically noted that although "there is evidence in this record that it may take awhile and sometime in the future for [Daugherty's land] to be a profitable venture . . . [n]onetheless it is still developable." (R18, p. 137, II. 17-20). We concur with the trial court's determination that Daugherty's land was still

capable of being developed in spite of the actions of Sarasota County. Sarasota County did not deprive Daugherty of all or substantially all economically viable use of his property, and it therefore did not effect a regulatory taking. Because there was no taking in this case, Daugherty could not have succeeded on the just compensation claims of counts I and VI as a matter of law. Accordingly, we reverse the district court's ruling on the ripeness issue as it applies to these two counts, and we instruct the district court on remand to enter judgment as a matter of law against Daugherty on counts I and VI.

B. *Count V: Due Process Takings.*

The trial court dismissed count V because it concluded that the due process takings claim was not yet ripe for federal consideration. We need not determine whether the trial court's ruling in this respect was correct, however, because we have concluded in Part IV.A. of this opinion that no taking of Daugherty's property occurred in this case. Obviously, if no property of Daugherty's was ever subject to a taking, then he could not prevail on his claim that his property was taken without due process of law. Accordingly, we instruct the trial court on remand to enter judgment as a matter of law against Daugherty on count V.

C. *Count III: Equal Protection.*

Daugherty claims that Sarasota County denied him the equal protection of the laws by denying him permit applications and by enacting Ordinance 89-76. These claims, contained in count III of the complaint, were the only ones permitted to go to the jury in this case. We have concluded that the trial court erred in denying Sarasota County's various motions for judgment as a

matter of law with respect to Daugherty's equal protection claims.

At the outset, we note that we concur with the trial court's conclusion that Sarasota County made a final decision with respect to Daugherty's equal protection claims such that these claims were ripe for federal review. Nevertheless, these claims should never have been submitted to the jury. Daugherty does not claim that Sarasota County classified him on the basis of his exercise of a fundamental right, nor on the basis of his race, ethnicity, gender, alienage, etc. Instead, Daugherty claims simply that Sarasota County treated him differently from other similarly situated persons, both in the denial of his permit applications and in enacting Ordinance 89-76. Equal protection challenges to government actions of this type trigger rational basis review by the federal courts. *See Executive 100*, 922 F.2d at 1541 (citing *Williamson v. Lee Optical*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955)). Under rational basis review, the question is whether the government action is rationally related to the achievement of a legitimate government interest. *Id.* (citing *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985)).

Daugherty has utterly failed to prove that the denial of his permit applications and the enactment of Ordinance 89-76 were not rationally related to the achievement of a legitimate government interest. Both decisions were logical attempts to protect residential and agricultural areas of the county from further harm from commercial borrow pits. The fact that the county may have made a bad decision in granting Davids a permit does not mean that the county was required to continue making bad decisions in order to avoid violating the Equal Protection Clause. Furthermore, contrary to Daugherty's assertion, the grandfather clause of Ordinance 89-76 does not

vitiate the ordinance's constitutionality. Sarasota County engaged in a logical balancing of the need to deter further development against the certain harm to current borrow pit operators if no grandfather clause were included in the ordinance. In the end, Sarasota County decided to prevent future construction of large-scale borrow pits while not closing down the borrow pits currently in operation. This regulatory scheme was a rational way of achieving the county's dual legitimate interests of minimizing future environmental and economic harm to the county and its businesses.

In light of the foregoing, it is clear that Daugherty could not, as a matter of law, prevail on his equal protection claims. It was thus error for the trial court to deny Sarasota County's motions for judgment as a matter of law. Accordingly, the jury's verdict in favor of Daugherty must be reversed, and judgment should be entered in favor of Sarasota County on the claims in count III of the complaint.[6]

D. *Counts II, IV, and VII, Unconstitutional Vagueness and Arbitrary and Capricious Due Process Violations.*

Counts II, IV, and VII[7] of the complaint allege

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6. As an alternate ground for our decision with respect to count III, we could conclude that an allegation of personal animus against an individual cannot give rise to an equal protection claim because the equal protection clause protects only against class-based discrimination. *Cf. Allen v. Louisville City Police Dept*, No. 91-6277, 972 F.2d 346, at 3 (6th Cir. July 17, 1992) (per curiam) ("In any event, this [equal protection] claim fails because plaintiffs have not alleged that defendants' actions were motivated by any type of class-based animus."). However, this argument was not raised in the trial court, and we therefore decline to reach it.

7. In this case, we believe it would have been futile for Daugherty to

(Cont'd)

constitutional error by Sarasota County on the grounds that Ordinance 81-60 is unconstitutionally vague and that the denial of Daugherty's permit applications and rezoning of his property constitute arbitrary and capricious due process violations. These counts allege violations of Daugherty's procedural and substantive due process rights. However, Daugherty has already challenged these alleged procedural and substantive due process violations in a petition for a writ of certiorari to a Florida circuit court. Having "carefully reviewed the record," the circuit court judge concluded that Daugherty was "accorded procedural due process [and] that the Board observed the essential requirements of the law." Final Order Denying Petition for Writ of Certiorari, contained in Order of December 9, 1994, App. 2. Daugherty never appealed the circuit court's ruling. Under our holding in *Lake Lucerne Civic Association, Inc. v. Dolphin Stadium Corporation*, 878 F.2d 1360, 1368-70 (11th Cir. 1989), *cert. denied*, 493 U.S. 1079 (1990), this state court review of Sarasota County's administrative actions is entitled to preclusive effect in later federal court proceedings. Thus, the trial court correctly concluded that principles of res judicata and collateral estoppel barred it from entertaining the procedural and substantive due process claims contained in counts II, IV, and VII of the complaint. Accordingly, we affirm the trial court's refusal to consider these claims.

E. *Miscellaneous Issues.*

The remaining issues in this appeal appear to be of little consequence. For instance, since the final result is a reversal of the jury's verdict, it does not much matter whether the trial court

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(Cont'd)
seek a variance from Ordinance 89-76. Thus, the arbitrary and capricious due process claim in count VII is ripe for federal adjudication.

erred in allowing the jury to impose mental anguish damages. Similarly, Daugherty's challenge to the stay of the permanent injunction is now moot. Finally, Sarasota County's challenges to the denial of its peremptory strike and its request for further voir dire are now irrelevant.

V. Conclusion

For the foregoing reasons, the judgment of the trial court is AFFIRMED in part, REVERSED in part, and REMANDED. On remand, we instruct the district court to enter final judgment in favor of Sarasota County on all seven counts contained in the complaint.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION FILED JANUARY 20, 1994

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 91-1092-CIV-T-24A

ROBERT D. DAUGHERTY,

Plaintiff,

v.

SARASOTA COUNTY, FLORIDA, a political subdivision of the State of Florida,

Defendant.

ORDER

THIS CAUSE is before the Court on Defendant, Sarasota County, Florida's Motion to Dismiss for Lack of Subject Matter Jurisdiction and alternative Motion for Summary Judgment (doc. 112). Defendant argues that the case is not ripe for federal adjudication and, therefore, must be dismissed for lack of subject matter jurisdiction. Defendant also argues that all of Plaintiff's claims are barred by the doctrines of res judicata, collateral estoppel, or by the applicable statute of limitations. Alternatively, Defendant argues that all of Plaintiff's claims must be dismissed because the plaintiff's evidence lacks sufficient quantity or quality to justify a jury trial.

Appendix C

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed a complaint and demanded a jury trial on August 23, 1991, seeking relief based on four different theories: 1) Defendant deprived Plaintiff of beneficial use of his property without just compensation, in violation of his rights under 42 U.S.C. § 1983 and the Fifth Amendment of the United States Constitution (just compensation claim); 2) Defendant's zoning regulation went too far, thereby destroying the value of Plaintiff's property to such an extent that it amounted to a taking without due process of law, in violation of the Fourteenth Amendment of the United States Constitution (due process takings claim); 3) Defendant's zoning regulation is arbitrary and capricious and, therefore, is an invalid exercise of the police power (arbitrary and capricious due process claim); and 4) the zoning regulation denies Plaintiff equal protection of the laws because it treats Plaintiff differently than similarly-situated individuals (equal protection claim).

For over ten years, Plaintiff has sought to use his real property for a commercial "borrow pit" to remove 550,000 cubic yards of dirt, and has repeatedly been denied permission to do so by Defendant. Plaintiff completed permit applications on May 29, 1983; December 18, 1984; June 24, 1986; and March 28, 1989. All of these applications were denied by Defendant. Subsequent to denials of the May 29, 1983, and the December 18, 1984, applications, Plaintiff sought review in Sarasota County Circuit Court. However, Plaintiff voluntarily dismissed each of these actions. Plaintiff also petitioned the court via writ of certiorari for review of the March 28, 1989, permit denial. The court denied Plaintiff's petition for writ of certiorari. On October 3, 1989, Defendant passed a zoning regulation limiting all borrow pits in the Plaintiff's zone to a

maximum excavation of 50,000 cubic yards during the life of the borrow pit.

Defendant moved to dismiss this case from federal court on November 14, 1991, alleging that the plaintiff failed to state a claim on which relief could be granted and that the court should not exercise jurisdiction under the doctrine of abstention. Defendant's motion was denied on January 30, 1992. Defendant moved for summary judgment on March 5, 1993, alleging that Plaintiff lacked sufficient evidence to support his claims. Subsequently, the parties entered into mediation in an attempt to reach an agreement. On February 1, 1994, the motion for summary judgment was denied without prejudice, to be refiled as necessary if mediation failed. On March 18, 1994, Defendant filed this motion to dismiss for lack of subject matter jurisdiction and, in the alternative, a motion for summary judgment.

II. DISCUSSION

A. *Federal Jurisdiction*

1. *Ripeness of Claim*

A just compensation claim becomes ripe for filing in federal court when two conditions are met: 1) a final determination is made regarding the status of the subject property; and 2) the property owner is denied a post-deprivation remedy. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). Defendant alleges that Plaintiff's just compensation claim is not ripe because the second condition has not been met. It is well established that, if the state government has provided just compensation to the

property owner, the owner does not have a federal claim for just compensation. *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1542 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 55 (U.S. 1991). Thus, unless a Plaintiff has been unsuccessful in a state inverse condemnation action, a claim for just compensation in federal court is not ripe for adjudication, because the state's action does not cause a constitutional injury "unless or until the state fails to provide an adequate post-deprivation remedy for the property loss." *Hudson v. Palmer*, 468 U.S. 517, 532 (1984).

In this case, Plaintiff did not file an inverse condemnation claim in state court. Plaintiff's just compensation claim accrued on October 3, 1989, when final action was taken by Defendant regarding the status of Plaintiff's property. *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514, 1519 (11th Cir. 1987). At this time, a state claim for inverse condemnation did not exist in Florida. *Id.* However, by 1990, inverse condemnation claims based on regulatory takings were available in Florida. *Joint Ventures, Inc. v. Department of Transp.*, 563 So. 2d 622, 628 (Fla. 1990).

The issue is which law governs — the law at the time Plaintiff's claim accrued (October 3, 1989) or the law at the time the complaint was filed (August 23, 1991). In *Williamson County*, 473 U.S. at 172, the United States Supreme Court stated that the Fifth Amendment of the United States Constitution requires that a "reasonable, certain, and adequate provision for obtaining compensation" exist at the time of the taking. *Id.* at 194. (citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-125 (1974)). Hence, in this case, since an inverse condemnation claim was not available in Florida at the time Plaintiff's claim accrued, he is not now required to pursue this remedy prior to filing an action for just

compensation in federal court. The fact that an inverse condemnation claim could have been pursued in Florida when Plaintiff filed his complaint in federal court on August 23, 1991 is irrelevant.

The plaintiff's due process takings, equal protection, and arbitrary and capricious claims are ripe for review. These claims become ripe when a final decision is made regarding the status of the property in question and do not require that the plaintiff proceed with an inverse condemnation claim in state court prior to filing in federal court. *Executive,* 992 F.2d at 1541; *Eide v. Sarasota,* 908 F.2d 716 (11th Cir. 1990).

2. *Statute of Limitations*

To provide consistency in all claims based on 42 U.S.C. § 1983, the state statute of limitations used for personal injury is applied. *See, e.g., Wilson v. Garcia,* 471 U.S. 261, 275-276 (1985). In Florida, this period is four years. Fla. Stat. § 95.11(3) (1993).

Plaintiff argues that a four year statute of limitations under Florida Statutes, § 95.11, is not applicable in this case because it is entitled "Limitations *other than for the recovery of real property.*" Fla. Stat. § 95.11 (1993) (emphasis added). Plaintiff argues that this case involves recovery of real property and, therefore, is governed by a seven year statute of limitations, as specified in Florida Statutes § 95.12. However, as clarified in other sections of Florida Statutes, chapter 95, the "recovery of real property" contemplated as an exception to § 95.11 are actions such as adverse possession, wherein the real property is actually being occupied by a party other than the true owner. Such is not the case here. Rather, this case involves just

compensation for a regulatory taking, with the true owner still occupying the property. Furthermore, should the personal injury statute of limitations not apply in this case, there would be great uncertainty regarding which statute of limitations is applicable. This is precisely the uncertainty the United States Supreme Court sought to avoid when it held that the state's statute of limitations for personal injury governs claims brought under 42 U.S.C. § 1983. *Wilson*, 471 U.S. at 275-276. Hence, the four year statute of limitations specified in Florida Statutes 95.11(3) is applicable in this case. Fla. Stat. § 95.11 (1993).

Using a four year statute of limitations, Defendant argues that Plaintiff's claims regarding Defendant's denial of permit applications prior to August 23, 1987, are barred, since Plaintiff's complaint was filed on August 23, 1991. However, Florida Statutes § 95.031 states that the statute of limitations period begins to run "from the time the cause of action accrues." Fla. Stat. § 95.031 (1993). A regulatory takings claim under § 1983 accrues when state authorities make a final determination on the status of the subject property affected by the ordinance. *Corn v. City of Lauderdale Lakes*, 905 F.2d at 588. Here, Plaintiff's cause of action accrued on October 3, 1989, when Defendant took final action changing the status of Plaintiff's property by passing a new zoning regulation banning borrow pits excavating greater than 50,000 cubic yards. Hence, Plaintiff's action, which was filed on August 23, 1991, was well within the statute of limitations period.

3. *Collateral Estoppel and Res Judicata*

The doctrine of collateral estoppel precludes relitigation of an issue that has already been litigated and decided in a prior

case. *I.A. Durbin v. Jefferson Nat'l Bank*, 793 F.2d 1548, 1549 (11th Cir. 1986). The four elements necessary for operation of this doctrine are the following:

> 1) the issue at stake must be identical to the one involved in the prior litigation; 2) the issue must have been actually litigated in the prior suit; 3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that action; and 4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.

Id. at 1549.

Defendant argues that Plaintiff's claims are barred by collateral estoppel because, when Plaintiff petitioned to have the Sarasota County Circuit Court review Defendant's denial of Plaintiff's March 28, 1989 permit application, Judge Titus denied Plaintiff's petition for writ of certiorari. However, when denying a petition for writ of certiorari, a court does not render a decision regarding any of the specific issues in the litigation. *Keay v. City of Coral Gables*, 236 So. 2d 133, 135 (Fla. 3d DCA 1970). Hence, because the final court order denying the petition for writ of certiorari did not permit Plaintiff to have a "full and fair opportunity to litigate" any of the issues he now raises, the present claims are not barred by the doctrine of collateral estoppel. *Durbin*, 793 F.2d at 1549.

The doctrine of res judicata precludes relitigation of claims that have previously been litigated or that *could* have been

litigated in an earlier suit. *Id.* Four elements are necessary for this doctrine to bar a subsequent action: "1) there must be a final judgment on the merits; 2) the decision must be rendered by a court of competent jurisdiction; 3) the parties, or those in privity with them, must be identical in both suits; and 4) the same cause of action must be involved in both cases." *Id.* at 1549.

Defendant argues that Plaintiff's claims are barred based on the doctrine of res judicata. Defendant again makes reference to Plaintiff's petitions to Sarasota County Circuit Court for review of his permit denials. In none of these instances, however, were Plaintiff's present claims decided on the merits. In fact, in the first two petitions for review, Plaintiff voluntarily dismissed the case, while in a third, the court denied the petition for writ of certiorari, as mentioned previously. Under the doctrine of collateral estoppel, claims are barred if they have actually been litigated in a prior suit or if they *could* have been litigated. As discussed previously, there has not been a final judgment on the merits of the present claims. Moreover, the claims brought in this action could not have been brought in the earlier petition for writ of certiorari, as such a discretionary review would have been limited to the record of the Commission hearing on the 1989 permit request. *Pettersen v. Nelson*, 269 So. 2d 22 (Fla. 4th DCA 1972). The specific issues involved in the present case would not have been properly attached to such a petition for review.

B. *Summary Judgment*

Defendant claims that, as an alternative to dismissal of the case because of lack of subject matter jurisdiction, summary judgment should be granted for Defendant because Plaintiff's

evidence is of insufficient quantity and quality to justify sending it to the jury. Summary judgment is appropriate only when the court is satisfied "that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." F.R.Civ.P. 56(c). The moving party bears the burden of this initial showing. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991).

In determining whether the movant has met this burden, the court must look at the evidence in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). If the non-moving party's evidence is "merely colorable, . . . or is not significantly probative, . . . summary judgment may be granted." *Anderson*, 477 U.S. at 249-250. Essentially, "the inquiry . . . is . . . whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251.

1. *Just Compensation Takings Claim*

The just compensation takings claims under 42 U.S.C. § 1986 will require the court to examine a number of material facts which are clearly in dispute here, including the following: 1) the economic impact of the change in zoning regulation; 2) the interference of the new zoning regulation with Plaintiff's investment-backed expectations and 3) whether variances will be allowed in the zoning regulation which would allow Plaintiff to pursue his original plans. These are all issues of genuine material fact which remain to be resolved by a jury. Plaintiff's evidence is sufficiently probative regarding the diminution in the property's value and the marked interference with his

investment-backed expectation resulting from Defendant's actions. Furthermore, the evidence presented by the parties presents sufficient disagreement to require that it be submitted to a jury. *Id.* Hence, the motion for summary judgment is denied on the issue of just compensation.

2. *Due Process Takings Claim*

Due process takings claims require that Plaintiff be denied economically viable use of his property by the zoning regulation. *Nolan v. California*, 483 U.S. 825, 834 (1987). The court in *Eide v. Sarasota*, 908 F.2d 716 (11th Cir. 1990), has stated that, in such a situation, the regulation goes so far and destroys property value so much that it has the same effect as a taking by eminent domain. Plaintiff states that the only reason he purchased the property was for borrow pit and other uses of the property are not financially feasible. In contrast, Defendant alleges that it is highly feasible for Plaintiff to develop the property and sell it as five-acre lots. Thus, there are genuine issues of material fact in this case regarding whether Plaintiff was denied economically viable use of his property by the denial of his permit applications and the subsequent change in the zoning regulation. Furthermore, the evidence presented on this issue is in sufficient disagreement to require submission to a jury. *Anderson*, 477 U.S. at 251-252. Hence, the motion for summary judgment is denied on the issue of due process takings.

3. *Arbitrary and Capricious Due Process Claim*

An arbitrary and capricious due process claim requires that there has been deprivation of a constitutionally protected interest and that the deprivation is the result of an abuse of

government power. *Eide*, 908 F.2d at 716. Zoning actions that are tainted with arbitrariness, capriciousness, and unfairness give rise to a constitutional claim. *Arlington Heights v. Metropolitan Housing Dev.*, 429 U.S. 252 (1977). Plaintiff claims that Defendant's repeated denial of his permit applications and subsequent change in the zoning regulation was arbitrary and is not substantially related to the public health, safety, morals, or general welfare, Defendant claims that the permit denials and zoning decision were based on the fact that the Plaintiff's proposed use of the land would not be compatible with neighboring land uses. Again, these differences in the parties' positions on this issue represent a genuine issue of material fact that must be resolved by a jury, precluding summary judgment. *Anderson*, 477 U.S. at 251-251.

4. *Equal Protection Claim*

To succeed on a claim of unconstitutional denial of equal protection, Plaintiff must prove that he was treated differently than other similarly situated individuals.*Executive 100, Inc., v. Martin County*, 922 F.2d at 1536. All persons similarly situated should have permits approved upon meeting certain unified standards. *Burstyn v. City of Miami Beach*, 663 F.Supp. 528 (S.D.Fla. 1987). Plaintiff alleges that other individuals were given approval for borrow pit operation using the same road as a haul route that he proposed to use. Defendant claims that Plaintiff is not being denied equal protection of the law since his situation differs from the others who were awarded permits. Genuine issues of material fact must be determined regarding whether Plaintiff was treated differently than similarly-situated individuals, and Plaintiff presents evidence that is significantly probative on this issue. *Anderson*, 477 U.S. 249-250. Therefore, summary judgment should also be denied regarding this claim.

For the foregoing reasons, it is

ORDERED that Defendant, Sarasota County, Florida's Motion to Dismiss for Lack of Subject Matter Jurisdiction and Alternative Motion for Summary Judgment (doc. 112) be denied.

DONE in Chambers at Tampa, Florida, this 20th day of September, 1994.

s/ Charles R. Wilson
CHARLES R. WILSON
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Counsel of Record

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION DATED DECEMBER 9, 1994

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 91-1092-CIV-T-24A

ROBERT D. DAUGHERTY,

Plaintiff,

v.

SARASOTA COUNTY, FLORIDA, a political subdivision of the State of Florida,

Defendant.

ORDER

THIS MATTER is before the court on the Defendant's Motion for Judgment as a Matter of Law or for a New Trial. (Doc. 204). The Defendant asserts a number of grounds allegedly requiring a judgment as a matter of law or alternatively requiring a new trial. For reasons set out herein, the motion is denied.

Defendant asserts that the equal protection claim raised in Count III of the Complaint is barred by principles of res judicata and collateral estoppel. The Defendant cites two reasons. First, they assert that the Plaintiff's attorney, in the 1989 administrative proceeding before the Sarasota Board of County

Commissioners upon application EM-454, argued equal protection in his presentation to the Board. Second, the Defendant urges that the Plaintiff thereafter specifically raised the denial of equal protection in his appeal of the County's denial of EM-454, which appeal was taken to the Circuit Court in and for Sarasota County on a Petition for Writ of Certiorari, (*Daugherty v. Board of County Commissioners of Sarasota County,* case number 89-3515-AP-01).

To determine the preclusive effect of such a state court proceeding, a federal court must apply the law of the state that rendered judgment. *McDonald v. Hillsborough County School Board,* 821 F.2d 1563, 1565 (11th Cir 1987). Florida law on res judicata states that it will apply only when four "identities" exist simultaneously. These "identities" are 1) identity of the things sued for; 2) identity of the cause of action; 3) identity of the parties; and 4) identity of the quality of the person for or against whom the claim is being made. *Albrecht v. State*, 444 So.2d 8, 12 (Fla. 1984).

In *Lake Lucerne Civic Association, Inc. v. Dolphin Stadium, Corp.*, 878 F.2d 1360, 1379 (11th Cir. 1989), the court held that a state circuit court's mandatory review of a petition for writ of certiorari filed after action before a Board of County Commissioners is the equivalent of a final adjudication on the merits and thus, the doctrines of res judicata and collateral estoppel would apply to issues actually litigated before the court.

The Defendant did not raise this issue before the undersigned until this motion was filed. A review of the file reveals the Defendant asserted the issue of claim preclusion as to the equal protection count in its Motion for Summary

Judgment. (Doc. 112). On September 20, 1994, magistrate judge Charles Wilson denied the Motion for Summary Judgment after specifically addressing the res judicata and collateral estoppel issues. (Doc. 158).

Thereafter, the Defendant filed a Motion for Reconsideration, (Doc. 170, 176). By this Motion, the Defendant specifically requested the court reconsider the issue of res judicata and collateral estoppel as these principles applied to the Plaintiff's substantive due process claim. The Motion did not request the court to reconsider these principles as they related to other claims.

As the record reflects, reconsideration was granted and the court dismissed the substantial process claim, as well as other claims. Thereafter, the matter proceeded to trial on the equal protection count. At the conclusion of the Plaintiff's case, the Defendant moved for a judgment as a matter of law. The Defendant specifically challenged the equal protection claim on the grounds that it was not ripe and on ground that Plaintiff had failed to prevent sufficient evidence to sustain the claim. The Defendant did not argue the res judicata issue as to Count III. The motion for judgment as a matter of law was denied as to the equal protection count.

The Defendant now argues that the administrative proceeding before the Sarasota County Commission and the subsequent review by the Circuit Court preclude Plaintiff's equal protetion claim. The court has thoroughly reviewed the record of the public hearing before the Sarasota Board of County Commissioners. The court concludes that indeed necessary safeguards were in place at this hearing, for instance, the Plaintiff was represented by counsel, he was allowed to

present witnesses and minimally to cross-examine a witness. However, the court finds that there was no assertion of an equal protection claim presented to the Board of County Commissioners. While other permit holders were indeed discussed during the proceedings, the court cannot find, in any way, where the equal protection claim asserted by the Plaintiff was before the Board and thus, the court finds that the commission hearing does not preclude the Plaintiff from litigating his equal protection on principles of res judicata.

The court has reviewed the Plaintiff's Petition for Writ of Certiorari filed in the Sarasota County Circuit Court under case number 89-315-AP-01. It is the court's conclusion that the Petition does not specifically argue or address the issue of equal protection, although the pleading does contain a quote from *Chicago M. & St. P. Ry. Co. v. State of Minnesota,* 134 U.S. 418, 458, 10 S.Ct. 462 (1899), containing language related to equal protection. In reaching this conclusion, this court has thoroughly reviewed the Defendant's response to this Petition. The response, although very thorough and prepared by the Defendant's current counsel, does not argue the purported equal protection issue. Furthermore, the Order of Circuit Court Judge Becky Titus, denying the Plaintiff's Petition on November 14, 1989, simply finds that the Plaintiff was accorded procedural due process, that the board had observed the essential requirements of law, and that the Board had supported its findings by substantial evidence. The court does not address an equal protection issue either. Thus, this court finds that the issue of equal protection was not presented to the circuit court either by the Plaintiff or the Defendant and thus, the Plaintiff is not precluded by principles of res judicata from asserting the issue in federal court. (A copy of the pertinent pleadings are attached as Appendix 1).

Appendix D

Once again, the Defendant argue that Ordinance 89-76, an ordinance purporting to limit the maximum excavation under any one permit to 50,000 cubic yards, is a rationally based ordinance which would not give rise to an equal protection claim. Plaintiff asserted at trial that the ordinance was a politically based action directed toward him alone. The Defendant denied this and offered testimony regarding the adoption of the ordinance. Plaintiff further argued that the ordinance lacked a rational basis in the face of exemptions or renewals granted to other permit holders who were excavating millions of tons of fill. This matter was presented to the jury by the evidence, through arguments of counsel, and by jury instructions. The court will not set aside the jury's determination on this issue.

The Defendant next asserted that the court's decision to allow Plaintiff to amend his pleadings during trial was prejudicial error. The court disagrees. This case, which was originally filed in 1991, was the subject of considerable discovery and motion practice. It was of no surprise to the Defendant that the Plaintiff claimed that the adoption of Ordinance 89-76 was an effort by the Defendant to thwart the Plaintiff's effort at developing a borrow pit and was a violation of equal protection. The court allowed the introduction of evidence relative to these matters, as they were a part of the Plaintiff's Complaint from the outset. The Defendant was not thwarted in any way from responding to these allegations. The Defendant's argument that this amendment led to confusing jury instructions and an ambivalent verdict form is also without merit. The jury instructions were expressly modified to satisfy the Defendant in this regards. As those instructions were modified in accord with the defendant's request, this argument is not well founded.

Appendix D

The record in these proceedings reflects that this court did side with the Defendant as to a number of counts, finding them not to be ripe for consideration. In so doing, the court overruled an earlier determination of the court. However, the court determined that the equal protection claim was indeed ripe for consideration. This Plaintiff had been repeatedly denied applications for earth moving permits during a period of time when numerous others were granted permits. The adoption of Ordinance 89-76 occurred only a few months subsequent to the final denial of an earth moving permit by Sarasota County on Plaintiff's application EM-454. This ordinance, as well as a subsequent amendment to the borrow pit ordinance reflects language showing direct consideration of the Plaintiff's own circumstances. It would have been utterly futile for this Plaintiff to have sought any additional determination under Ordinance 89-76 in the face of the record of the proceedings of Sarasota County's dealings with Robert Daugherty. Under the circumstances, the matter of the denial of equal protection was ripe for federal court determination. *Executive 100, Inc. v. Martin County,* 922 F.2d 1536 (11th Cir. 1991); *Resolution Trust Corporation v. Town of Highland Beach,* 18 F.3d 1536, 1547 (11th Cir. 1994).

The Defendant also asserts that the court's charge to the jury concerning the equal protection claim was erroneous and misleading. The court disagrees and believes that the final instructions substantially incorporated all of those matters requested by the Defendant in their proposed instructions. The court disagrees that its instruction "effectively directed a verdict on the issue of whether Plaintiff had met the requirements for a borrow pit." The instruction specifically advised the jury that to prove his claim, Mr. Daugherty had to show that having met all the requirements of receiving an earth

moving permit, Sarasota County, in denying his 1989 permit, treated him differently from other similarly situated borrow pit applicants. The Plaintiff argued that the evidence established that he had met all of the requirements for receiving an earth moving permit and that he was denied equal protection. The Defendant argued that Mr. Daugherty had not met all of the requirements for receiving an earth moving permit and that there was no equal protection violation. The burden was on the Plaintiff to establish these facts, the jury was so instructed. The court will not overturn the jury's determination in this instance and does not find that its jury instructions prejudiced the Defendant in any way.

Defendant also argued that the court utilized an ambiguous verdict form over the objections of the Defendant.

The argument is misleading in that the Defendant asserted they objected to the verdict form used by the court. This is accurate to the extent that the Defendant had submitted their own proposed verdict form, which set out in interrogatory form certain questions for the jury. (A copy of the proposed verdict form is attached as Appendix 2). However, the Defendant did not object to the verdict form used by the court for the reasons set out in this Motion for New Trial. *Cf.* Rule 51 Fed. R. Civ. P.; *Pate v. Seaboard Railroad, Inc.*, 819 F.2d 1074 (11th Cir. 1987). If the Defendant had this objection at the time, it should have been timely raised to allow the court to consider the merits and rule accordingly.

Finally, the Defendant asserts it is entitled to a new trial because the court erroneously refused to allow Defendant to exercise preemptory challenge as to juror, Dannette W. Flowers. By this argument, the Defendant asserts it is entitled to

a new trial because the court would not allow for the exclusion of Ms. Flowers, one of two black jurors on the venire. At the trial, the Defendant sought to excuse Ms. Flowers because she was not intelligent. The court found no basis in the records to support such a conclusion and the Defendant offered no other non-discriminatory reason for seeking to excuse Ms. Flowers. Both Plaintiff and Defendant were allowed individual voir dire in this case. Nothing adduced by either party gave rise to any appropriate, non-race based reason, to exclude Ms. Flowers.

In contrast, the court did allow the Plaintiff to exclude the other black juror on the basis of the fact that she worked as an underwriter for an insurance company. The Plaintiff expressed concerns that such an employee might be prone to be biased in favor of defendants over plaintiffs. As indicated at the trial, this is a common concern on behalf of the Plaintiff's bar. Such concerns do not appear to be wholly unfounded and more importantly, such concern was wholly unrelated to the matter of race in this instance. Therefore, it was the court's conclusion that the Plaintiff was entitled to exercise a preemptory challenge where the Defendant was not. It appearing to this court that race may have played a part in the challenge attempted to be exercised by the Defendant, the court found, and does again find, that the Defendant's failure to articulate a fact specific non-discriminatory reason for exercise of this preemptory challenge precluded the exercise of such peremptory as to Ms. Flowers. The Defendant has not overcome the appearance that it exercised its preemptory challenge on the basis of the juror's race. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 111 S.Ct. 2077 (1991); *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364 (1991); *Hancock v. Hobbs*, 967 F.2d 462 (11th Cir. 1992).

Accordingly, for the reasons stated herein, the Defendant's

Appendix D

Motion for Judgment as a Matter of Law or for a New Trial, (Doc. 204), is DENIED.

Done and Ordered in Tampa, Florida this 9th day of December, 1994.

s/ Tom McCoun
TOM McCOUN
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
Jawdet I. Rubaii, Attorney for Plaintiff
Robert Cyril Widman, Attorney for Defendant

FILED
DEC 5 1996
CLERK

No. 96-698

In The

Supreme Court of the United States

October Term, 1996

ROBERT D. DAUGHERTY,

Petitioner,

vs.

SARASOTA COUNTY, a political subdivision of the State of Florida,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This is a case about an experienced businessman and real estate broker, Robert D. Daugherty ("Daugherty") who sought to excavate 60 acres of property as a commercial borrow pit, without regard for the environmental impacts on his neighbors, after which he planned to develop the property as a "waterfront" residential development with houses around the flooded pits.

Sarasota County ("the County") brings the Court's attention to the following misstatements and omissions by Daugherty in his petition for a writ of certiorari:

1. Daugherty states that borrow pits were a permitted use in the zoning district applicable to his property (Pet. pp. 1-2). The zoning code provided, however, that this use was subject to compliance with the County borrow pit ordinance (Ord. 81-60). Under the provisions of Ord. 81-60, where excavated material is to be hauled off-site, an evidentiary public hearing is required before the County Commission, and no permit can be granted unless the County Commission determines, based on the evidence at the hearing, that the operation will not cause adverse environmental impacts such as excessive fugitive dust along the haul route (App. B, pp. 3a-3b).

2. All of Daugherty's borrow pit permit applications sought to use as his off-site haul route for between 100 to 200 dump truck trips per day, an unpaved, dirt access easement across developed residential subdivision lots. Daugherty consistently refused to agree at the public hearings before the County Commission to pave the access to avoid excessive amounts of fugitive dust. Such excessive fugitive dust had previously resulted in the revocation of a prior, ill-advised permit granted to Wendell Davids (App. B, p.4a).

3. Daugherty notes that following his last permit denial in 1989, he sought review of the County Commission's decision in state circuit court by petition for writ of certiorari (Petition, p. 2, ¶1). Under Florida law, this was, however, not a discretionary writ but an appeal of right, and the state court ruled on the merits that Daugherty had been accorded due process and that the County had complied with the essential requirements of law and that its decision was supported by substantial competent evidence. Daugherty took no further appeal from this judicial affirmance of the County Commission's denial of his permit (App. B, p. 5a).

4. Daugherty states that Ordinance 89-76 rendered futile any further efforts by Daugherty to obtain a permit (Petition, p. 2). In the aftermath of several legal challenges to commercial borrow pit denials, the County Commission, based on recommendations of its professional staff, amended the zoning code by Ord. 89-76 to limit the size of borrow pits in three related zoning districts to non-commercial, agricultural scale borrow pits pending adoption of strengthened environmental provisions in the County's borrow pit ordinance. Once those strengthened borrow pit regulations were adopted, the limitation on the size of borrow pits in all three zoning districts was repealed (App. B, pp. 4a-4b).

5. Daugherty asserts (Pet. p. 3, n. 1):

> The Court of Appeals erroneously claimed that the [just compensation] claims were dismissed on a motion for judgment as a matter of law. . . .

This is the beginning of an effort to manufacture an issue (Pet. p. 7, Point II) out of distortion and misrepresentation of the Eleventh Circuit's opinion. Daugherty's flawed contention

is that, either by mistake or perverse intent, the Court of Appeals improperly denied Daugherty a trial on his just compensation taking claims. The Eleventh Circuit opinion never incorrectly states that the *just compensation taking claims* were disposed of on a motion for judgment as a matter of law at the close of Daugherty's case-in-chief. Significantly, Daugherty fails to indicate where in the Eleventh Circuit opinion this statement was supposedly made.

It is clearly stated in the briefs before the Eleventh Circuit that the just compensation takings claims (Counts I and VI) were dismissed prior to trial on the County's motion to dismiss or for summary judgment (County's Initial Brief, p. 3).

In reviewing the procedural history of the case, the Eleventh Circuit opinion correctly states (App. B, pp. 6a-7a):

> The trial court received various motions *for summary judgment and for judgment as a matter of law*. In response, the trial court dismissed counts I and VI, containing the just compensation claims, for lack of subject matter jurisdiction because the just compensation claims were not yet ripe.
>
> * * *
>
> Finally the trial court dismissed the due process takings claims of Count V for lack of subject matter jurisdiction because it was not yet ripe.

In its discussion of the just compensation claims of Counts I and II (App. B, pp. 10a-12a), the Eleventh Circuit determined that these claims should not have been dismissed for lack of

ripeness. The Court of Appeals, however, had reviewed the record to determine whether the trial court had erred in granting the County's motion for judgment as a matter of law at the close of Daugherty's case-in-chief on his *due process taking claim (Count V)*. The Eleventh Circuit concluded that, with respect to the due process taking claim, Daugherty had failed to present sufficient evidence that he had been deprived of "all or substantially all economically viable use of his property". Since, in the context of this case, this was an element of proof essential to both the just compensation and due process takings claims, the Eleventh Circuit ruled that both types of taking claims must fail (App. B, pp. 11a-12a). Daugherty was afforded the opportunity at trial to prove a taking during his case-in-chief, and he simpy failed to do so.

It is ironic that Daugherty seeks to impugn the decision of the Eleventh Circuit for supposedly misapprehending the procedural history of this case regarding his just compensation claims in light of the fact that Daugherty's appellate brief erroneously asserted to the Eleventh Circuit that his just compensation claims had been barred by the trial court based on *res judicata* rather than ripeness! (Daugherty's Initial Brief on Cross Appeal, p. 48).

REASONS FOR DENYING THE WRIT

I.

COUNTY'S RESPONSE TO DAUGHERTY'S "REASONS FOR GRANTING THE WRIT"

Daugherty erroneously states that "The appellate opinion eliminates equal protection claim (sic) for non-minority landowners" (Pet. p. 4). The Eleventh Circuit opinion does *not* hold that non-minority landowners are without an equal protection remedy. It merely applies the established law that

where different treatment is accorded to persons and there are no "suspect classifications" involved (*e.g.*, race, ethnicity, gender, etc.) governmental action will be upheld if there is a rational basis for the different treatment (App. B, p. 13a). *Eide v. Sarasota County,* 908 F.2d 716 at 722 (11th Cir. 1990), *cert. denied,* 498 U.S. 1120, 111 S. Ct. 1073, 112 L. Ed. 2d 1179 (1991).

Daugherty requested the Eleventh Circuit to review the trial court's granting of judgment as a matter of law on his due process taking claim. The Eleventh Circuit reviewed the trial court's decision *de novo* and concluded after a review of the record that judgment as a matter of law was appropriate on all taking claims, including temporary taking claims, because of a failure of sufficient evidence by Daugherty in his case-in-chief that his property had been deprived of all or substantially all economically viable use (App. B, pp. 11a-12a).

II.

EQUAL PROTECTION CLAIMS

Daugherty demonstrates no conflict between the Circuits or with the decisions of the Supreme Court and instead merely asserts that the Eleventh Circuit's decision in this case applies a different standard from the standard in another Eleventh Circuit case, *E & T Realty v. Strickland,* 830 F.2d 1107 (11th Cir. 1987). *E & T Realty* is easily distinguishable from the Daugherty case because *E & T Realty* dealt with the administrative denial of ministerial matters rather than quasi-judicial and legislative actions by a local governing body. *E & T Realty,* 830 F.2d at 1114, n. 8. Judge Edmundson, who sat on the panel that decided *E & T Realty,* also sat on the panel in this case, making it even more implausible that the Court of Appeals misapprehended the applicability of *E & T Realty*.

The application of the rational basis standard of review to

equal protection cases which do not involve constitutionally suspect classifications, such as race, ethnicity, gender, etc., is well established. *Executive 100, Inc. v. Martin County,* 9222 F.2d 1536 (11th Cir.) *cert. denied,* 502 U.S. 810, 112 S. Ct. 55, 116 L. Ed. 2d 32 (1991).

To assert as Daugherty apparently does (Pet. p. 6) that the application of the rational basis standard of review means that:

> only certain classes (African Americans, women, etc.) not individuals will receive the safeguards of the equal protection clause of the Fourteenth Amendment . . .

is to ignore the decisions of this Court. *Cleburne v. Cleburne Living Center,* 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

Daugherty (Pet. p. 6) misleadingly quotes only a portion of a footnote in the Eleventh Circuit opinion to give the impression that the Eleventh Circuit was holding that the equal protection clause does not apply to non-class-based discrimination. In fact, the full quote (App. p. 14a) makes it clear that, while speculating that it *could* dispose of Daugherty's equal protection claim on the basis of a lack of *any class-based discrimination, i.e.,* involving no "non-suspect" classification as well as no "suspect" classification, the Eleventh Circuit panel *specifically declined to base its ruling on such an argument.*

Apparently, Daugherty is seeking, through a scattershot argument infused with misstatements, to persuade the Supreme Court that the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of the Supreme Court's supervisory power. Rule 10(a), Rules of the Supreme Court.

Quite obviously, however, the Eleventh Circuit properly reviewed on appeal whether, with respect to Daugherty's equal protection claims, there was a rational basis for the denial of Daugherty's 1989 borrow permit application and whether there was a rational basis for the County Commission's adoption of Ordinance 89-76 limiting the size of borrow pits in various zoning districts (App. pp. 13a-14a). The determination of whether a rational basis exists for distinctions made by local governments between individuals in land use matters is a question of law for the court and subject to *de novo* review on appeal. *United States v. Garrett,* 3 F.3d 390 (11th Cir. 1993), *cert. denied,* __ U.S. __, 114 S. Ct. 1100, 127 L. Ed. 2d 413 (1994); *Greenbriar Ltd. v. City of Alabaster,* 881 F.2d 1570 at 1578 (11th Cir. 1989).

The Eleventh Circuit did not invade the province of the jury on Daugherty's equal protection claims but, instead, ruled on a fundamental question of law in accordance with the established legal standard.

Accordingly, Daugherty's petition, based on his equal protection claims, is without merit.

III.

TAKING CLAIMS

Daugherty oddly and inappropriately characterizes the basis of the Eleventh Circuit's decision on his taking claims as a "joke" (Pet. p. 7). In reality, it is Daugherty's argument that is off-color and falls flat.

Daugherty tries to make much of the fact that his just compensation taking claims (Counts I and VI) were dismissed prior to trial on ripeness grounds despite the fact that he was

permitted to present his evidence and testimony on his due process taking claim (Count V) before judgment as a matter of law was entered against him at the close of his case-in-chief, also on ripeness grounds. At that time, the trial court stated that Daugherty had also failed to present sufficient evidence to support a finding that the County had deprived him of all or substantially all of the economically viable use of his property (App. B, p. 11a).

Contrary to Daugherty's statement that the Eleventh Circuit based its decision solely on a remark by the trial court (Pet. p. 7-8), the Eleventh Circuit *independently reviewed the record de novo* to determine whether judgment as a matter of law should have been granted (App. B, pp. 8a, 9a, 10a, 11a). Although the Eleventh Circuit ruled that the trial court should not have granted judgment to the County based on ripeness, it concurred with the trial court's assessment that Daugherty had failed to offer sufficient evidence to establish that any portion of his property had been deprived of all or substantially all economically viable use, *even on a temporary basis* (App. B, pp. 11a-12a).

Since Daugherty failed to present sufficient evidence on an element critical to both his due process taking claim as well as his just compensation claim, the Eleventh Circuit properly ruled that both types of taking claims must fail.

CONCLUSION

Daugherty's petition fails to establish any basis meriting consideration of his case by the United States Supreme Court.

No conflict is established between the holding in this case and the decisions of the other Circuits or the Supreme Court.

No *bona fide* departure is demonstrated by the Eleventh Circuit from the accepted and usual course of judicial proceedings in analyzing and ruling on the legal issues presented.

Daugherty's petition is but the latest extension of a shotgun lawsuit in federal court, following a meritless appeal in state court, from the denial of an ill-conceived and air polluting mining scheme. As with its progenitors, Daugherty's petition for a writ of certiorari should be denied.

Respectfully submitted,

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